

Water Transfer Discussion Papers

Issue 2

Regulatory Processing/Streamlining

Background

There are literally hundreds of water transfers that take place every year in California. Some involve moving water from one farm to a neighboring farm, and others involve moving water from northern to southern California. Most of the transfers can be accomplished without approval from any governmental entity. If a transfer involves changing the place of use, purpose of use, or point of diversion of a post-1914 water right, the approval of the SWRCB is required. If Department of Water Resources (DWR) or Bureau of Reclamation (Bureau) facilities are needed to transport the water, their permission is required. If the transfer involves changing the flow in a natural watercourse, the Department of Fish and Game (DFG) and the US Fish and Wildlife Service (USFWS) should be consulted. There is a lot of concern with transfers that involve moving water across the Delta because of the potential for impacts to fish and wildlife. Surprisingly, some of these transfers can be accomplished without the approval of the SWRCB because they do not involve changing an existing water right.

To initiate a transfer that is jurisdictional to the State Water Resources Control Board (SWRCB) the owner of a water right is required to file a petition with the SWRCB under Water Code Section 1725 et seq. (temporary) or Section 1735 et seq. (long-term). Most transfers are temporary (one year or less). (This paper therefore will focus on the process for the temporary transfers.) Because of the short-term nature of most transfers, there is normally some urgency associated with the processing and approval of the transfer. Temporary transfers are exempt from the California Environmental Quality Act (CEQA), but long-term transfers are not. This can make it desirable to effect a long-term transfer by doing a series of temporary transfers. The SWRCB will question consecutive temporary transfers that are essentially the same and normally will not approve more than two consecutive temporary transfers.

When a transfer petition is filed, the SWRCB requires the petitioner to provide information on the amount of water to be transferred, the existing and new places of use, the parties involved in the transfer, and the anticipated environmental effects of the proposed transfer. Once the information is received the SWRCB issues a public notice of the proposed transfer. The public then has the opportunity to file objections to the transfer. The SWRCB encourages the parties to resolve the objections, and the SWRCB staff assists in this process by suggesting terms and conditions that will allow the SWRCB to make the findings discussed below.

Before the SWRCB can approve a temporary transfer, it must make the following findings:

- o The transfer would only involve the amount of water that would have been consumptively used or stored by the water right holder in the absence of the transfer.
- o The transfer would not injure any legal user of the water.
- o The transfer would not unreasonably affect fish, wildlife, or other instream beneficial uses.

If the SWRCB cannot make the above findings within 60 days of receipt of the petition or within any extension of that period approved by the water right holder, the SWRCB is required to set the matter for hearing. The SWRCB will then issue an order approving or denying the transfer based on the hearing record.

Following the expiration of the transfer period, all rights automatically revert to the original holder of the water right without any action by the SWRCB.

Issues

Because of the urgency normally associated with short-term transfers, they are often filed shortly before the parties would like to begin transferring the water. The SWRCB Division of Water Rights gives processing of transfer petitions the highest priority. However, when petitions are filed at the last-minute, the SWRCB is not always able to meet the schedule for beginning the transfer. To overcome this, the SWRCB has encouraged parties to file transfer petitions earlier, or discuss the transfer with SWRCB staff and other agencies as soon as it is conceived. Quite often the SWRCB is able to provide guidance on what information to provide and how to coordinate with other agencies. Transferring parties have been cooperative in this regard in recent years.

Even though temporary transfers under Section 1725 are exempt from CEQA, the SWRCB must still make a finding that the transfer will not unreasonably affect fish, wildlife, or other instream beneficial uses. To make this finding the SWRCB usually asks the petitioner to provide whatever information is needed. This finding is the most difficult to make for cross-delta transfers. The process has been facilitated in recent years because in the approval of the 1995 Bay-Delta Plan, the SWRCB evaluated the cumulative effects of transfers with the current operating criteria in the Delta. However, the USFWS will request reconsultation under the ESA if transfers exceed 350,000 AF in any given year.

The SWRCB must also make a finding under Section 1725 that the water would have been consumptively used or stored in the absence

of the proposed transfer. This finding can be difficult to make particularly in the case of a water right holder that also has a Bureau of Reclamation (Bureau) contract for water. In these cases the SWRCB must find that it is the water right holder's water that is being transferred not the Bureau's.

When previously stored water is being transferred there is an issue of refilling the reservoir without adversely affecting senior downstream water users. In these cases the SWRCB tries to develop some refill criteria that will protect downstream right holders. More work is needed to develop standard refill criteria and on "carriage water" requirements assessed by DWR and USBR for cross Delta transfers. (See Issues 5 and 6.)

Many transfers involve numerous governmental agencies, eg SWRCB, DWR, Bureau, DFG, and USFWS. There have been suggestions that provisions be made for "one-stop shopping" so that necessary approvals can be acquired at one place at one time. This would probably require statutory changes, but might expedite the approval process for some transfers.

Solutions

1. Parties should be encouraged to discuss jurisdictional transfers with the SWRCB and file petitions as early as possible.
2. Parties should talk with the Department of Fish and Game (DFG), the Bureau, the Department of Water Resources (DWR), and other agencies as early as possible.
3. The methods for determining water availability and environmental effects must be clearly defined.
4. The parties should provide information on water availability and environmental effects as early as possible.
5. Develop refill criteria for transfers that involve previously stored water.
6. Develop standard environmental terms that will allow the SWRCB to make the necessary environmental findings.
7. The "carriage water" requirements assessed by DWR or USBR need to be re-evaluated.
8. Provisions for "one-stop shopping" for approval of transfers should be explored.